IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED
1.4.2016
DATE SIGNATURE

CASE NO: 2137/2014

DATE: 1/4/2016

IN THE MATTER BETWEEN

BIBICHE MBUYI MUYAYA	APPLICANT
AND	
CHAIRMAN: THE REFUGEE APPEAL BOARD	1ST RESPONDENT
REFUGEE STATUS DETERMINATION OFFICER (G M MASHILOANE)	2ND RESPONDENT
THE MINISTER OF HOME AFFAIRS	3RD RESPONDENT
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	4TH RESPONDENT

JUDGMENT

MSIMEKI, J

[1] Applicant, in this application, seeks an order as follows:

"1. Reviewing and setting aside the decision of the first respondent to dismiss the applicant's appeal made on 17 May 2013;

2. Reviewing and setting aside the decision of the second respondent not to grant the applicant refugee status made on 20 July 2006;

3. An order declaring that the applicant is a refugee and that she has a right to refugee status in South Africa and directing the respondents to grant her refugee status within one week of service of the Court's order and to deliver formal notification or confirmation of such in writing to the applicant's attorneys within two weeks thereof;

4. In the alternative to prayer 3, directing that the applicant's appeal in her asylum application be referred back to the first respondent to be heard *de novo* or with such directives as the Honourable court deems appropriate in the circumstances;

5. Ordering the respondents to pay the costs of this application in the event that they oppose the application;

6. Further and/or alternative relief."

The application is opposed by respondents.

BRIEF BACKGROUND FACTS

[2] Applicant is an asylum seeker from the Democratic Republic of Congo ("DRC"). A mother of children, one of whom was born in South Africa, she was born on 23 January 1979. Documents reflect different places as her place of birth. She attributes this to her failure to understand English when she arrived in South Africa. She applied for asylum and refugee status in South Africa. This entailed her having to

attend interviews with a Refugee Reception Officer ("RRO"), Refugee Status Determination Officer ("RSDO") and finally appearing before the Refugee Appeal Board ("RAB"). The RSDO refused to grant applicant asylum and refugee status. Applicant then appealed against the refusal to the Refugee Appeal Board. The RAB confirmed and upheld the RSDO's decision and dismissed applicant's appeal. Applicant, after her appeal against the decision of the RSDO was dismissed, brought this review application which is opposed by respondents. The application serves before me.

[3] The RSDO was Ms G M Mashiloane ("Mashiloane") while the chairman of the RAB was Mr M M Mohale ("Mohale").

[4] It is important to note that applicant's application for asylum and refugee status had been brought in terms of sections 3(a) and (b) read with section 24 of the Refugees Act 130 of 1998 ("the Refugees Act").

[5] Mashiloane found that applicant did not have a "well-founded fear" for persecution when she made the application. Applicant, according to her, bore the burden of proof to show that "she is entitled to refugee status". The standard of proof, according to her, was "that of real risk" which had to be considered "in the light of all the circumstances surrounding the applicant's claim".

[6] Her finding, effectively, was that applicant never considered "making internal relocation in other parts of DRC". Applicant, in her view, "should have considered to

make internal relocation in DRC before she left her country to RSA to arears which are under government control". The conclusion was:

> "In light of the above information your application is rejected as unfounded. Your fear is not well-founded and therefore you do not meet the criteria to qualify as a refugee."

[7] Mr Slabbert, for applicant, in the review application, submitted that the standard applied by Mashiloane was incorrect as the correct one ought to have been one of "reasonable possibility of persecution". The correct test, according to him, was applied in the case of *Tantroush v Refugee Appeal Board and Others* 2008 1 SA 232 at [97] in which reference is made to *Immigration and Naturalisation Service v Cardoza-Touseca* 480 US 421 (1987) at 440. See also *Fang v Refugee Appeal Board and Others* 2007 2 SA 447 (T) and *Van Garderen NO v Refugee Appeal Board* (unreported decision, TPD case number 30720/2006 of 19 June 2007).

[8] Mohale handed down the RAB's decision on 17 May 2013. He dismissed applicant's appeal for the sole reason that he held the view that there were "material credibility concerns" in applicant's evidence. He found applicant's evidence incredible due to "inconsistencies" between her evidence during her appeal hearing and her evidence during her three initial interviews.

[9] The nub of the matter, according to Mr Slabbert, was that applicant had provided some further detail not covered by her Eligibility Determination Form ("EDF"). This, he submitted, had been caused by improper interpretative assistance that applicant received during the interviews. Applicant's explanation for her seeking asylum,

according to him, remained the same as that recorded in her initial application, namely that she had feared for her life and safety as a result of the outbreak of ethnic and/or political violence. He did not see any contradictions in applicant's versions which he saw as further elaboration on circumstances surrounding her decision to flee the DRC and seek refugee status in South Africa. Further, as he submitted, the difference regarding her place of birth had been occasioned by the improper interpretation as applicant, at the time, did not know English. She could only speak French, Lingala and Swahili. Use, at the time, was made of lay interpreters, friends and relatives whose knowledge of English had not been perfect. Mr Slabbert regards the inconsistency relating to applicant's place of birth as of no consequence.

[10] Applicant was represented before the RAB. Heads of argument which, according to Mr Slabbert, were not considered when the appeal was heard, were provided. Mr Slabbert submitted that little to no consideration at all was given by Mohale in his ruling to the actual inconsistencies that he relied on when he reached the adverse conclusions regarding applicant's credibility or their materiality to applicant's case. The inconsistencies, as he saw them, related to "inconsistencies in recounting peripheral details that did not go to the heart of the applicant's case". "A cursory credibility analysis on peripheral points", according to him, was elevated to a level of importance out of all proportion.

[11] Mr Slabbert submitted that there was procedural unfairness; failure to consider relevant facts; errors of law; unconstitutionality and general unlawfulness as well as the fact that the RAB had been improperly constituted. He held the view that if the RAB had been improperly constituted, that in itself would be dispositive of the matter

because its decision would have been null and void as the RAB would have acted *ultra vires*. I agree and this seems to be common cause.

[12] Mr Slabbert submitted that any decision to deport applicant and her children back to the DRC would infringe several of her and her children's constitutionally entrenched rights and would, eventually, contravene South Africa's international law obligations and would be unlawful. He finally, on the basis of reasonable apprehension of bias and inordinate delays, implored the court to substitute its own decision for the decisions of the relevant authorities and not refer the matter back to "dilatory officialdom".

[13] In short, applicant's grounds of review, according to Mr Slabbert, are:

1. the improper constitution of the RAB;
2. procedural unfairness;
3. failure to consider relevant facts and errors of law; and
4. unconstitutional and general unlawfulness.

[14] Mr Bofilatos SC, for respondents, on the other hand, held the view that applicant's application ought to be dismissed with costs. In the alternative he submitted that the court ought to refer the matter back to the RAB for reconsideration and reserve the costs pending the outcome of the decision of the RAB.

[15] It was Mr Bofilatos' view that the language had not been any problem as no one had complained about it. The improper constitution of the RAB had not been dealt with in the founding affidavit but only in the replying affidavit. The court would not be acting

properly, according to him, in the event that it decided to entertain the improper constitution of the RAB. I do not agree. The issue, as Mr Bofilatos correctly submitted, was raised in the replying affidavit by applicant. I also do not think that this is a case where the court ought to be barred from raising the issue *mero motu*.

[16] Mr Bofilatos submitted that it could not be correct that applicant and her interpreters could not communicate properly. He bases his submission on the fact that the interpreters would not be able to suck from their thumbs the information that they communicated to the relevant officers unless they got the information from applicant.

[17] It was further Mr Bofilatos' submission that issues not raised and canvassed in pleadings and affidavits ought not to be considered. The result would be that applicant's application would be liable to be dismissed with costs.

[18] It is important to first determine if the RAB was properly constituted. This, indeed, disposes of the matter should I find that the RAB was not properly constituted. This, in that event, would render it unnecessary to even have to consider the other issues that have been raised.

[19] It is perhaps also important to refer to sections 3(a), (b) and (c) of the Refugees Act 130 of 1998 ("the Refugees Act") on which applicant based its application for asylum and refugee status.

A person, in terms of section 3 of the Refugees Act, qualifies for a refugee status for the purposes of the Act if he/she:

"(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in para (a) or (b)."

THE CONSTITUTION OF THE RAB

[20] Section 24 of the Refugees Act provides that where the RSDO refuses refugee status and asylum on the basis that the application is rejected as "unfounded" or "manifestly unfounded" an applicant whose application it so rejected, has a right to lodge an appeal with the RAB.

[21] In terms of section 13(1) read with section 15(5) of the Refugees Act:

"1. The Appeal Board must consist of a chairperson and at least two other members appointed by the Minister with regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications

and expertise and his or her capability to perform the functions of the Appeal Board properly.

2. At least one of the members of the Appeal Board must be legally qualified." (My emphasis.)

[22] How the Appeal Board goes about doing its work is guided by section 26 of the Refugees Act. The section determines how an asylum seeker whose application has been rejected lodges an appeal to the RAB. The procedure that the RAB must follow before it reaches its decision to set aside or substitute any decision of the RSDO is set out in section 24(3). In terms of section 26(4) "the Appeal Board must allow legal representation upon request of the applicant".

[23] Murphy J in *Tantoush v Refugee Appeal Board and Others* 2008 1 SA 232 (T) in paragraph [86], on the basis of section 12(3) of the Refugees Act, noted that the RAB has to function without bias and independently.

[24] The constitution of the RAB was a subject of consideration in *Heverimana v Chairperson, Refugee Appeal Board and Others* 2014 5 SA 550 (WCC). There the RAB had consisted of one member, the second respondent, when the appeal was dismissed on 3 November 2011. The submission, on behalf of the respondents, had been that although section 13(1) provided that the RAB "must consist of a chairperson and at least two other members" that in no way meant that "all had to sit at any one appeal hearing" and that "to the extent that section 13(2) provided that at least one of the members must be legally qualified", "first respondent, the legally qualified member, had monitored the decision of second respondent". Davis J rejected both

submissions. On the basis that sections 13(1) and 13(2) are unambiguous and very clear I fully agree with the decision of Davis J in rejecting the submissions.

[25] Section 15 of the Refugees Act provides that the chairperson of the RAB convenes the meetings of the RAB and the majority of members constitute a quorum. This, according to Davis J, implies that at least two persons have to be present for a quorum to be constituted. I agree. Davis J, as a result, ruled that the RAB's decision "on 11 November 2011 was legally invalid, because it was not properly constituted". Consequently the decisions of the first and second respondents of 3 November 2011, dismissing applicant's appeal against third respondent's decision and rejecting applicant's application for refugee status and asylum as unfounded and third respondent's decision of 2 August 2008, rejecting applicant's appeal for refugee status and asylum were reviewed and set aside.

[26] It must be remembered that section 13(1) of the Refugees Act is peremptory. As shown above, an improperly constituted RAB is incapable of taking valid decisions.

[27] What I have found quite remarkable is that Mohale sat alone in *Heverimana v Chairperson, Refugee Appeal Board and Others (supra)*.

[28] The purported RAB hearing took place on 16 April 2013. Mohale handed down a written decision (the RAB's decision) on 17 May 2013. This was when he dismissed applicant's appeal. The record of proceedings and the written decision reveal that the panel which heard applicant's appeal consisted of one member only, namely M M Mohale.

[29] I indicated earlier on that it was clear that if I found that the RAB was not properly constituted, that in itself, would be determinitive and dispositive of the matter. Clearly documents demonstrate that Mohale was the sole member of the RAB when the appeal received attention. It cannot therefore be said that the decision that he took on his own was valid. It was clearly *ultra vires* because sections 13(1) and 13(2) of the Refugees Act were not complied with. For this reason alone the decision must be reviewed and set aside.

[30] It is not necessary, as I have already indicated, to deal with the other issues that were raised. The RAB has not acted and must act.

[31] Mr Bofilatos submitted that the application ought to be dismissed with costs and that applicant could bring another application at a later stage. In the alternative, he submitted that the matter could be referred back to the RAB for reconsideration. The application cannot be dismissed because the RAB did not act. Its action is *ultra vires* and null and void.

[32] The decision of the RAB of 17 May 2013, in my view, dismissing applicant's appeal should be reviewed and set aside. Further, applicant's appeal in her asylum application should be referred back to first respondent to be heard *de novo*. Respondents, in my view, should pay the costs of this application.

ORDER

[33] The following order is made:

1. The decision of the first respondent on 17 May 2013, dismissing applicant's appeal, is hereby reviewed and set aside.

2. Applicant's appeal in her asylum application is hereby referred back to first respondent to be heard *de novo*.

3. Respondents are ordered to pay the costs of this application.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

2137/2014

HEARD ON: 28 JULY 2015
FOR THE APPLICANT: ADV J P SLABBERT
INSTRUCTED BY: CLIFFE DEKKER HOFMEYER INC
FOR THE RESPONDENTS: ADV G BOFILATOS SC
INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA